Supreme Court of the United States.

No. 212.—October Term, 1906.

William W. Bierce, Limited, a corporation, Appellant, *vs.* Clinton J. Hutchins, Trustee.	Appeal from the Supreme Court of the Territory of Hawaii.

[April 8, 1907.]

Mr. Justice Holmes delivered the opinion of the Court.

This is an appeal from a decision upon a bill of exceptions in a case tried by the court of first instance without a jury. *Hecht* v. *Boughton*, 105 U. S. 235. The facts were found by the trial court and certain conclusions of law were stated, which the Supreme Court of the Territory held to be wrong. It sustained the exceptions upon one point which went to the roo, of the plaintiff's cause of action, and, upon the plaintiff's motion coupled with a statement that it would have no further evidence to present at a second trial, ordered a judgment for the defendant, in order that the case might be brought to this Court. The findings of fact were taken to be true by the Supreme Court and are not open to dispute, except so far as they depend upon rulings of law, so that the questions for decision here are definite and plain, and there is no need to send the case back for a statement of facts by the Supreme Court, although one should have been made. *Stringfellow* v. *Cain*, 98 U. S. 610. *Harrison* v. *Perea*, 168 U. S. 311, 323.

The suit was replevin for certain rails, cars, engines and goods, delivered by the appellant to the Kona Sugar Company, Limited, and sold by a receiver of that company to the appellee with full notice of the appellant's claim. Originally there was a contract for the sale of this property for cash, but the Kona Company having failed to pay, the appellant offerred certain "terms in settlement of the contract" previously made, as follows: "We will take in settlement of this contract the sum of $10,000, U. S. gold coin, and the promissory note of the Kona Sugar Company Limited for the sum of $37,044.53, in favor of William W. Bierce, Limited, payable six months after date at the Whitney National Bank in New Orleans, bearing interest at the rate of seven and one-half per cent. (7½%) per annum and secured by First Mortgage Bonds of the Kona Sugar Company, Limited, of par value equal to the note, said bonds being

portion of a duly authorized issue not exceeding $200,000. This offer is conditioned upon its acceptance by you, payment of the money and the delivery of the note, with collateral, before 4 P. M. on Thursday, March 14th, A. D. 1901.—Upon such payment being made to us before the hour named, we will deliver to you the bills of sale authorizing you to take charge of the rails, locomotives, cars, scales and other materials now awaiting delivery, upon the express condition and understanding that said rails, locomotives, cars, scales and other materials are and shall remain the property of William W. Bierce, Limited, until the full payment of the note above described, according to its terms." This offer was accepted, this contract took the place of that previously made, and the property was delivered.

For purposes of decision the Supreme Court assumed that, under the foregoing instrument, the passing of title was subject to a condition precedent, but intimated that the majority of the Court thought otherwise, if it had been necessary to decide the point. It was not necessary because the Court was of opinion that, if there was such a condition, it was lost by what was considered an election on the plaintiff's part. The Court below had found that there was no election, and therefore the question was and is whether the acts done by the appellant constituted one as matter of law. If not, then it must be considered whether the sale was on a condition precedent, and those are the two questions of law in the case.

The facts are simple. After the last contract was made the Kona Company got into trouble and a receiver was appointed. The appellant thereupon filed a claim of lien upon the railroad supposed to belong to the Kona Company, for materials used in the construction and equipment of the road, the materials referred to being the property in question. On or about August 1, 1902, it brought a suit to enforce this lien and in November of the same year filed a petition in the Kona Company proceedings asking that a decree already made for the sale of all the Kona Company's property should be modified so as to except all liens from the operation of the sale. Only a part of the property was used in the construction of the road and under any circumstances the claim of a lien would have been bad. The lien suit was dismissed, before anything had been done in it, in January, 1903. On February 13 the appellant, by leave of Court, filed a petition in the Kona Company proceedings for an order that the receiver either should pay the amount due upon its note or deliver the property, setting up the contract and alleging that its title to the property still remained. The abortive lien proceedings constitute the election that is supposed to have brought the appellant's title to an end. We have not gone into further particulars because there can be no doubt that to claim a lien upon anything is inconsistent with asserting a title to it, and may be assumed

to be sufficient to manifest an election if one is possible. The appellant's allegations in its first petition could give no additional strength to its choice.

Election is simply what its name imports; a choice, shown by an overt act, between two inconsistent rights, either of which may be asserted at the will of the chooser alone. Thus, "if a man maketh a lease, rendering a rent or a robe, the lessee shall have the election." Co. Lit. 145a. So a man may ratify or repudiate an unauthorized act done in his name. *Metcalf* v. *Williams*, 144 Mass. 452, 454. He may take the goods or the price when he has been induced by fraud to sell. *Dickson* v. *Patterson*, 160 U. S. 584. He may keep in force or may avoid a contract after the breach of a condition in his favor. *Oakes* v. *Manufacturers' Ins. Co.*, 135 Mass. 248, 249. In all such cases the characteristic fact is that one party has a choice independent of the assent of any one else. But if a man owns property he has no election to transfer it to another. He cannot make the transfer unless the other assents. And equally, if he owns property subject to be divested by the performance of a condition, he has no election to divest it without performance. The other party must assent. Transfer is very different from election, and requires acts of a different import on the part of the owner, and corresponding acts on the part of the transferee.

In the case at bar there is no pretense that the appellant's conduct purported to convey the property to the Kona Company in advance of the performance of the stipulated conditions. The case stands on election alone, and the appellant had no right to elect in the sense of the argument. It could not obliterate the condition and leave the contract in force. It may be that it had an election to avoid the contract altogether, but, if so, it did not attempt to do it. It insisted on the contract as the ground of its claim to a lien for the price of the goods. The election supposed and relied upon is an election to keep the contract in force, but to leave out the reservation of title. It must be kept in mind that the effect attributed to the assertion of the lien is attributed to it as a strictly unilateral act, not as an offer to which an assent might be presumed. As such an act the appellant could not give it the supposed effect. It is quite true, as we have said, that the assertion of a lien is inconsistent with the assertion of a title, *Van Winkle* v. *Crowell*, 146 U. S. 42, and, therefore, if a lien had been established by judgment or decree, the title would be gone by force of an adjudication inconsistent with its continuance. But the assertion of a lien by one who has title, so long as it is only an assertion and nothing more, is merely a mistake. It does not purport to be a choice, and it cannot be one because the party has no right to choose. The claim

in the lien suit, as was said in a recent case, was not an election but an hypothesis. *Northern Assurance Co.* v. *Grand View Building Assoc'n*, 203 U. S. 106, 108. The fact that a party, through mistake, attempts to exercise a right to which he is not entitled does not prevent his afterwards exercising one which he had and still has unless barred by the previous attempt. *Snow* v. *Alley*, 156 Mass. 193, 195.

There remains the question whether the sale was conditional. Such sales sometimes are regulated by statute and put more or less on the footing of mortgages. With the development of its effects there has been some reaction against the Benthamite doctrine of absolute freedom of contract. But courts are not legislatures and are not at liberty to invent and apply specific regulations according to their notions of convenience. In the absence of a statute their only duty is to discover the meaning of the contract and to enforce it, without a leaning in either direction, when, as in the present case, the parties stood on an equal footing and were free to do what they chose.

The contract says in terms that it is conditional and that the goods are to remain the property of the seller until payment of the note given for the price. This stipulation was perfectly lawful. *Harkness* v. *Russell*, 118 U. S. 663. So that the only question is whether any other provision of the contract is inconsistent with this one or qualifies and explains it as intended to do less than it purports to do when taken alone. *Chicago Railway Equipment Co.* v. *Merchants' National Bank*, 136 U. S. 268. The fact that possession was to be and was delivered, and that it must have been contemplated that the rails would be put down upon a roadway no doubt assumed, it seems, wrongly, to belong to the Kona Company, had no such effect, as between vendor and vendee. Neither did the requirement of additional security in the form of first-mortgage bonds of the company. It may have been expected that the mortgage would embrace a part or the whole of this property, but there is nothing more common than a provision in a mortgage that it shall apply to and embrace after-acquired property, with sufficient description to ascertain the same and bring it within the mortgage when acquired. And if the mortgage would have been operative at once by way of estoppel in favor of third persons, there was the more reason for exacting an interest under it to save the vendor's rights in that event. Of course the absolute liability for the price, and putting that liability in the form of a note, are consistent with the retention of title until the note is paid. Parties can agree to pay the value of goods upon what consideration they please, *White* v. *Solomon*, 164 Mass. 516, and when a purchaser has possession and the right to gain the title by payment, he cannot complain of a bargain by which he binds himself to pay and is not to get the title until he does.

It was suggested that the ratification of the contract by the Kona Company did not mention the condition. But it got its rights from the contract and, of course, got only such rights as the contract gave. Some other subordinate suggestions were made, but we have disposed of the only questions that are open here.

Judgment reversed.

True copy.

Test:

Clerk Supreme Court, U. S.